

*This is a redacted version of the original hearing officer decision. Select details have been removed from the decision to preserve anonymity of the student as required by IDEA 2004. Those portions of the decision which pertain to the student's gifted education have been removed in accordance with 22 Pa. Code §16.63 regarding closed hearings.*

## **Pennsylvania Special Education Hearing Officer Final Decision and Order**

### **CLOSED HEARING**

#### **ODR File Number:**

25676-21-22

#### **Child's Name:**

I.D.

#### **Date of Birth:**

[redacted]

#### **Pro Se Parent:**

[redacted]

#### **Local Education Agency:**

Pennsylvania Leadership Charter School  
1322 Enterprise Drive  
Westchester, PA 19380

#### **Counsel for the LEA**

Kimberly Colonna, Esq.  
McNees, Wallace  
100 Pine Street  
Harrisburg, PA 17108

#### **Hearing Officer:**

James Gerl, CHO

#### **Date of Decision:**

February 28, 2022

## **BACKGROUND**

The charter school filed a due process complaint seeking to override the parent's failure to provide consent for a reevaluation of the student and seeking an order relieving the charter school of the obligation to provide special education services to the student in the event that the parent and the student do not comply with said order. I find in favor of the charter school with regard to the override of consent for the reevaluation because the charter school has proven that the proposed reevaluation is necessary to determine the student's continuing eligibility for special education and to determine the student's needs and weaknesses in order to design an appropriate program. The failure to consent to the reevaluation is overridden. I find in favor of the parent with regard to the additional relief sought by the charter school.

## **PROCEDURAL HISTORY**

The *pro se* parent participated in the prehearing phase of this proceeding, including a last minute request for a continuance of a previously scheduled hearing and an extension of the decision due date. The hearing officer granted the continuance and extension over the objection of the charter school. Despite participating in the early phases of this matter, however, the parent failed to appear at the scheduled prehearing conference and at the due process hearing. When the parent did not appear at the hearing, the hearing officer instructed charter school staff to attempt to contact the parent. In addition, the hearing officer sent an e-mail message to the parent alerting her that the hearing had begun. When the parent did not respond to the attempts to contact her after approximately one hour, the hearing officer ordered that the presentation of testimony at the hearing would begin.

This hearing was conducted in one virtual session. One witness testified on behalf of the charter school. Charter school exhibits S-1 through S-9 were admitted into evidence at the hearing.

In view of the fact that the parent was proceeding without legal counsel, the hearing officer ordered that the record be kept open for a period of over three weeks in order to permit the parent an opportunity to come forward with a good reason for not appearing at the due process hearing. The hearing officer made it clear that the *pro se* parent would be allowed to present testimony and other evidence if such a reason were presented. The *pro se* parent did not take advantage of said opportunity. Accordingly, the record was closed.

Prior to the hearing, the charter school submitted a prehearing brief. After the hearing, the charter school filed a written closing argument. The parent was afforded the opportunity to file a prehearing brief and a written closing argument but elected not to do so. All arguments and proposed findings submitted by the parties have been considered. To the extent that the arguments advanced by the parties are in accordance with the findings, conclusions and views stated below, they have been accepted, and to the extent that they are inconsistent therewith, they have been rejected. Certain arguments and proposed findings have been omitted as not relevant or not necessary to a proper determination of the material issues as presented. To the extent that the testimony of various witnesses is not in accordance with the findings as stated below, it is not credited.

Personally identifiable information, including the names of the parties and similar information, has been omitted from the text of the decision that follows. FERPA 20 U.S.C. § 1232(g); and IDEA § 617(c).

## **ISSUE PRESENTED**

The following issue is presented by the complaint filed by the local education agency:

**Has the charter school proven that it should be permitted to reevaluate the student despite the refusal of the parent to consent to the reevaluation?**

## **FINDINGS OF FACT**

Based upon the evidence in the record compiled at the due process hearing, I make the following findings of fact. <sup>1</sup>

1. The student's date of birth is [redacted]. The student is in [redacted] grade. (S-6)

2. Before attending the charter school, the student attended school in a school district where the student was determined to be eligible for special education under the category of other health impairment (ADHD) [redacted]. (S-1; NT 30, 36)

3. The previous school district concluded that the student was not presenting with any special education needs as of January 18, 2021. (S - 1; S-6; NT 33, 44)

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<sup>1</sup> (Exhibits shall hereafter be referred to as "S-1," etc. for the charter school's exhibits; references to page numbers of the transcript of testimony taken at the hearing is hereafter designated as "NT\_\_\_").

4. The previous school district filed a due process complaint, ODR File No. 24513-20-21, seeking to override the parent's refusal to consent to a reevaluation of the student. The case proceeded to hearing, and on May 10, 2021, the hearing officer ruled in favor of the school district permitting it to override the parent's failure to consent to the reevaluation because the reevaluation was needed in order to determine the student's needs and weaknesses, to design an appropriate educational program and to determine whether the student continued to be eligible for special education. The assessments proposed by the previous school district were never conducted. (S - 3; S - 6; NT 34)

5. The student transferred from the school district to the charter school, which is the local education agency in this proceeding, in August 2021. (S-6; NT 30)

6. The charter school is a public charter school that serves students from kindergarten through twelfth grade, as well as students eligible for special education through the age of 21. The charter school provides its classes by computer and via the internet. [redacted] . (NT 29 - 30; S-7)

7. Staff at the charter school, including the charter school supervisor of special education, the assistant supervisor of special education and a social worker reviewed the student's records from the prior school district, including the student's evaluations, IEP and the decision in ODR File No. 24513-20-21. (NT 30 - 34, 49 - 50; S-5)

8. The charter school supervisor of special education e-mailed the parent on September 15, 2021 stating that a reevaluation of the student was necessary to determine the student's strengths and weaknesses and to inquire about conducting assessments for the reevaluation. (S-4; NT 34)

9. The parent responded with an e-mail on October 6, 2021 stating that the student “will not assess” and that the student had refused to give answers when the previous school district had tried to evaluate the student. (S-4; NT 53 - 54i)

10. On October 6, 2021, the charter school again sent an e-mail to the parent stating that the student needed to be reevaluated so that the charter school could properly develop an IEP for the student. The charter school included a Permission to Reevaluate form with the e-mail. (S-4, S-5; NT 34 – 35)

11. The reevaluation proposed by the charter school included the following assessments: observation of the student in the cyber school environment, IQ, achievement, perception/motor, memory, social/emotional/ behavior (with specific assessments in the area of executive functioning), interview and a review of records. The proposed reevaluation also included an interview with the student’s family. The reevaluation was to be supervised by the charter school’s psychologist. (S-5; NT 35 - 37)

12. The charter school proposed a comprehensive evaluation in order to obtain a complete picture of the student’s needs, to determine what specifically designed instruction and modifications the student might need and to understand how the student’s ADHD was affecting the student and to determine the student’s present levels of performance in the charter cyber environment. (S-5; NT 35 – 37)

13. The assessments listed in the charter school’s proposed reevaluation would not be difficult, harmful or traumatic for the student. (S-5; NT 55 – 56; 35 - 37)

14. The parent did not respond to the charter school’s October 6, 2021 e-mail and did not sign the permission to reevaluate or otherwise

consent to the reevaluation proposed by the charter school. (NT 48 – 54; S-5)

15. At the student’s IEP team meeting on October 8, 2021, the parent continued to object to the student being reevaluated. (NT 51 – 52; S-6)

16. On October 8, 2021, the charter school developed an IEP for the student. The IEP for the student included a goal for self-advocacy. The IEP did not include the goals that the student had mastered while in the previous school district. (S-2, S-6; NT 38 – 40)

17. The progress monitoring pertaining to the student’s self-advocacy goal during the first and second marking periods of the 2021-2022 school year shows that the student had demonstrated mastery of the self-advocacy goal. (S-8, S-9; NT 40 – 43)

18. The student had mastered all of the student’s IEP goals as of the date of the hearing. (S-6, S-8, S-9; NT 36 – 43, 32)

19. As of the date of the hearing, the student had not been reevaluated in over three years and had not undergone psychoeducational testing for over six years. (S-3, S-5; NT 32 – 33, 43 – 44)

20. At the end of the student’s first month at the charter school, the student had a grade of “A-” in Spanish and a grade of “A” in all of the student’s other classes. The student’s teachers reported that the student is an enthusiastic learner who demonstrates outstanding effort and that the student is actively engaged in the learning process. (S-6; NT 57 – 58)

## **CONCLUSIONS OF LAW**

Based upon the arguments of the parties, all of the evidence in the record, as well as my own independent legal research, I make the following conclusions of law:

1. A public agency must reevaluate each child with a disability at least once every three years unless the parent and the public agency agree that a reevaluation is unnecessary. Individuals With Disabilities Education Act (hereafter sometimes referred to as "IDEA") 20 U.S.C. § 1400, *et seq.* § 614(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2).

2. If a parent refuses to consent to a reevaluation, a public agency may, but is not required to, pursue the reevaluation by using the IDEA consent override procedures, including the filing of a due process complaint. IDEA § 614(c)(3); 34 C.F.R. § 300.300(c)(ii); Questions and Answers on IEPs, Evaluations and Reevaluations, 111 LRP 63332 (OSERS 2011) (Question D-4).

3. In conducting an evaluation, a local education agency must use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about the child. It must use technically sound instruments to assess the child. The assessments must be conducted by trained and knowledgeable personnel and administered in accordance with any instructions provided by the producer. The child must be assessed in all areas related to the suspected disability. The evaluation must be comprehensive. When conducting an evaluation, a local education agency must review appropriate existing evaluation data, including classroom-based assessments and observations by a teacher or related service providers, and on that basis determine whether any additional data are needed to determine whether the student is eligible, as well as to



identify the child's special education and related services needs. Perrin ex rel JP v Warrior Run Sch Dist, 66 IDELR 254 (M. D. Penna. 2015); IDEA § 614; 34 C.F.R. §§ 300.301, 300.304 – 300.305; 22 Pa. Code § 14.123.

4. A local education agency that files a due process complaint to override consent will be permitted to conduct the reevaluation where it proves that the reevaluation is necessary to determine the student's needs and weaknesses in order to design an appropriate program or to determine continuing eligibility. See, Plum Borough Sch Dist, 111 LRP 56978 (SEA Penna. 2011); Cumberland Valley Sch Dist, 117 LRP 39108 (SEA Penna. 2017); GB by TB v. San Ramon Area Valley Unified School District, 51 IDELR 35 (N.D. Calif. 2008); Spring Branch Independent School District, 76 IDELR 59 (SEA Tex. 2019).

5. In the instant case, the charter school has proven that the proposed reevaluation is needed to determine the student's needs and weaknesses in order to design an appropriate program and in order to determine whether the student continues to be eligible for special education.

## **DISCUSSION**

### **I. Merits**

#### **Has the charter school proven that it should be permitted to reevaluate the student despite the refusal of the parent to consent to the reevaluation?**

The charter school seeks to override the parent's refusal to consent to the reevaluation of the student. The charter school contends that the reevaluation is necessary to collect data to determine the needs of the student in order to design an appropriate IEP and to determine the student's

continuing eligibility for special education. The parent did not appear at the hearing and has not submitted any argument with regard to the parent's position on this issue. It is clear from the record evidence, however, that the parent has refused to consent to the reevaluation of the student.

There is no relevant Supreme Court or Third Circuit precedent concerning the override of lack of consent for a reevaluation. Hearing officers, however, generally permit a local education agency to override the lack of consent for a reevaluation where the local education agency proves the reevaluation is necessary to determine the student's needs, strengths and weaknesses in order to design an appropriate educational program or to determine the student's continuing eligibility for special education.

It should be noted that on May 10, 2021, this hearing officer issued a decision regarding this student and the parent's refusal to consent to a reevaluation when the student was enrolled in a previous school district. Despite the order in that decision permitting the local education agency to override the parent's lack of consent, the student still has not been reevaluated. More than three years have passed since the student's last evaluation and the student has not been tested in over six years. The student is overdue for a comprehensive reevaluation.

Moreover, the charter school has proven that the student has mastered the student's IEP goals and presents with no special education needs. The only remaining IEP goal that the student had not yet mastered at the previous school district involved self-advocacy. The charter school has demonstrated that the student had mastered the self-advocacy goal in the student's time at the charter school. Thus, a comprehensive reevaluation is needed in order to determine whether the student is still eligible for special education.

The charter school has demonstrated that the reevaluation it proposed is appropriate. The assessments proposed by the school district were selected to determine the student's needs, as well as the student's present levels of performance. The assessments proposed would have assessed the student's cognitive needs, executive functioning, and academic functioning, among other areas. The proposed reevaluation would assess the student in all areas of suspected disability and would be conducted by qualified personnel. If the student continued to be eligible for special education, the proposed assessments were needed in order for the charter school to determine the student's educational needs and to develop an appropriate educational program.

It is clear that the charter school has shown that the proposed reevaluation and the proposed assessments are necessary. The testimony of the charter school's witness was credible and persuasive. The parent has not submitted any evidence or argument to counter the strong evidence presented by the charter school.

It is concluded that the charter school has proven that it should be permitted to override the parent's refusal to consent to the reevaluation of the student and to conduct the proposed reevaluation, including the proposed assessments. The charter school has shown that the proposed reevaluation is necessary to determine whether the student continues to be eligible for special education and, if so, to determine the student's needs and weaknesses so that the district may design an appropriate educational program for the student.

## **II. Relief**

The charter school has shown that it is entitled to conduct the proposed reevaluation of the student. In addition to the remedy of being allowed to override the parent's failure to consent to the reevaluation, the charter school seeks additional relief in this case. Specifically, the charter school accuses the parent of gamesmanship and seeks an order that if the parent and student do not cooperate in the reevaluation process, that the charter school shall be excused from any obligation to provide special education services to the student until they do cooperate.

In support of the requested additional relief, the charter school cites Silva v. District of Columbia, 57 F. Supp. 3d 62, 63 IDELR 217 (D.C. 2014). The case cited by the charter school, however, is clearly distinguishable. In that case, the *pro se* parent failed to comply with an order by the hearing officer to refile a complaint after the previous complaint had been dismissed without prejudice. The fact situation in that case is not similar to a reevaluation consent override case. The authority cited by the charter school as to this point is not persuasive. Indeed, the charter school has not cited any case which involves a fact pattern of a requested override of consent for reevaluation in which a hearing officer or a court ordered that the local education agency also be relieved of its responsibility to provide special education in the event of potential future noncompliance.

The parent did behave inappropriately by failing to appear at the hearing and the prehearing conference for this case after first requesting a last-minute continuance of a previously scheduled hearing date. The parent has also resisted the reevaluation of the student in the previous school district. It cannot be assumed, however, that a party to a due process hearing will willingly fail to comply with an order by an IDEA hearing officer.

It is true, as the charter school's brief points out, that IDEA hearing officers have broad equitable authority to issue appropriate relief in an IDEA case. Forest Grove School District v. TA, 557 U.S. 230, 129 S. Ct. 2484, 52 IDELR 151 (U.S. 2009); Stapleton v. Penns Valley Area Sch. Dist., 71 IDELR 87 (M.D. Penna. 2017); See, Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516, 43 IDELR 32 (D.C. Cir. 2005); Garcia v. Board of Education Albuquerque Public Schools, 530 F. 3d 1116, 49 IDELR 241 (10th Cir. 2008); In re Student with a Disability, 52 IDELR 239 (SEA WV. 2009).

Despite the broad authority to award appropriate relief, however, it is inconsistent with the basic principles of collaboration underlying the Congressional intent in establishing IDEA to assume that parties to a due process proceeding will not comply with a hearing officer's order. As the Supreme Court has stated, collaboration among parents and the school is crucial to the success of the special education system. Schaffer v. Weast, 546 U.S. 49, 44 IDELR 150 (2005).

The charter school has not cited any case law or other legal authority to support its position that the hearing officer should order the student to be exited from special education in the event of potential future non compliance with the reevaluation process by the parent or student. Thus, the charter school has failed to support its claim for additional relief. The issue of relief for a hypothetical future event is not properly before the hearing officer.

Moreover, if the parent does in fact fail to make the student available for the reevaluation or otherwise fails to have the student participate in the proposed assessments, as the charter school fears, the charter school is then free to exercise the procedural safeguards provided by IDEA or to take other appropriate actions as provided by the statute. The charter school has

not proven that it will suffer any harm if the additional relief is not awarded at this time. Accordingly, the request for the additional relief is denied.

**ORDER**

Based upon the foregoing, it is HEREBY ORDERED as follows:

1. The charter school's request to override the parent's failure to consent to the proposed reevaluation of the student, including the assessments proposed therein, is granted; the charter school may conduct the proposed reevaluation; and

2. The additional relief sought by the charter school in this matter is denied.

**IT IS SO ORDERED.**

ENTERED: February 28, 2022

*James Gerl*

James Gerl, CHO  
Hearing Officer